

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER:MAN:TL-N-2830-95  
CMBaerga

date:

to: Chief, Examination Division, Manhattan  
Attn.: Karl Waiting, International Examiner

from: District Counsel, Manhattan

subject:

Proposed Imposition of I.R.C. Section 6038B Penalty

U.I.L. 6038B.02-00

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You asked for assistance to determine the impact of changes to I.R.C. § 6038B enacted subsequent to issuance of the original Field Service Advice in this case. We conclude that changes made to § 6038B by the Taxpayer Relief Act of 1997, P.L. 105-34; H.R. 2014; 111 Stat. 788, do not affect the previous advice.

Previously, at your request, the office of Chief Counsel reviewed the transactions engaged in by the taxpayer in [REDACTED] and [REDACTED] that you identified as falling under I.R.C. § 6038B. In Field Service Advice, Chief Counsel agreed with the determination to assert the penalty described in § 6038(b) as it existed prior to the changes made by the Taxpayer Relief Act of 1997.

In 1997 the penalty calculation changed. It is now equal to 10% of fair market value rather than 25% of gain. It is now also capped at \$100,000 unless the violation is intentional. The changes are not retroactive and thus do not apply to either [REDACTED] or [REDACTED]. Nothing in the changes to the statute indicates that they were meant to apply in any way to the tax returns or to the transactions identified in this case.

At your request we have reviewed the previous advice and we have discussed the prior memoranda and the changes to the statute with the Associate Chief Counsel (International) and his staff. We are of the collective opinion that the previous advice remains unchanged. No facts brought to our attention since the advice was issued would have changed the advice given.

We also considered the information that you developed after issuance of the initial memorandum, and we reconsidered the valuations performed by the IRS Economist that underlie the penalty calculation. We are still of the opinion that the evidence supports imposition of the penalty. Further, we believe that the valuation is adequate to support your calculations and the taxpayer's position is weak and can be rebutted.

Based on the facts set forth in the previous memoranda we reaffirm the conclusions stated therein.

LINDA R. DETTERY  
District Counsel

By: \_\_\_\_\_  
PETER J. LABELLE  
Assistant District Counsel

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